

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Aloha Partners, L.P. Request for)	FCC File No. 0001777981
Waiver of Section 27.60;)	
Request for Expedited Ruling;)	
Request for Extension of Time To File)	
Response)	

ORDER

Adopted: August 26, 2005

Released: August 26, 2005

By the Deputy Chief, Mobility Division:

1. On February 18, 2005, the Wireless Telecommunications Bureau (Bureau) released a Memorandum Opinion and Order granting a request for waiver of Section 27.60 of the Commission's rules filed by Aloha Partners, L.P. (Aloha), in connection with Aloha's amended application seeking authority to operate seven base stations in Tucson, AZ.¹ On February 28, 2005, the Bureau granted Aloha's amended application.² On March 30, 2005, the Association for Maximum Service Television, Inc. (MSTV) and Tucson Communications L.L.C. (Tucson) (collectively, MSTV/Tucson) jointly filed an Application for Review seeking Commission review of the Bureau's actions, arguing that the Bureau misapplied the waiver standard, acted beyond its authority, and acted contrary to the public interest.³

2. On April 5, 2005, Aloha filed a Request for Expedited Ruling that the MSTV/Tucson Application for Review was untimely filed, arguing that it should be dismissed on procedural grounds.⁴ According to Aloha, an expedited ruling on this procedural flaw was necessary because any opposition to the Application for Review must have been filed by April 14, 2005, pursuant to Section 1.115(d) of the Commission's rules.⁵ According to Aloha, the

¹ Aloha Partners, L.P. Request for Waiver of Section 27.60, *Memorandum Opinion and Order*, 20 FCC Rcd 3744 (WTB 2005).

² See ULS File No. 0001777981, granted February 28, 2005.

³ Application for Review of the Association for Maximum Service Television, Inc. and Tucson Communications L.L.C. (filed Mar. 30, 2005). In addition, Paxson Communications Corporation filed an Application for Review of the same waiver order on March 21, 2005. See Paxson Communications Corporation, Application for Review (filed Mar. 21, 2005).

⁴ Request for Expedited Ruling, Letter from Thomas Gutierrez, counsel for Aloha Partners, L.P., to Marlene H. Dortch, Secretary, FCC (filed Apr. 5, 2005) (Aloha Request).

⁵ Aloha Request at 3, citing 47 C.F.R. § 1.115(d).

expense of preparing a formal opposition is inequitable if required to be filed in response to an Application for Review which the Commission will procedurally dismiss as untimely filed.⁶

3. On April 11, 2005, MSTV/Tucson filed a response to Aloha's Request for Expedited Ruling, arguing that the Application for Review was not late-filed because the 30-day window for filing the Application for Review began upon public notice of the Bureau's grant of Aloha's amended application associated with the waiver request, and therefore Aloha's request should be denied.⁷ Furthermore, MSTV/Tucson argue that even if the Application for Review was untimely filed, the Bureau should consider it on the merits because strict compliance with the deadline would be inconsistent with the public interest, given the potential for a significant loss of free, over-the-air television service.⁸ On April 14, 2005, Aloha filed a Request for Extension of Time to File Response, arguing that as of that date there had been no ruling on Aloha's request that MSTV/Tucson's Application for Review be dismissed as untimely.⁹

4. With very limited exception, only the Commission is authorized to rule on applications for review.¹⁰ If, however, the applicant has failed to meet the filing requirements of Sections 1.115(d) and (f) of the Commission's rules, the Chief of the Wireless Telecommunications Bureau may dismiss such application on delegated authority.¹¹ In seeking the Bureau's dismissal of MSTV/Tucson's Application for Review, Aloha relies upon Section 1.115(d) of the Commission's rules, which states that that an application for review must be filed within 30 days of public notice of action taken pursuant to delegated authority.¹² As indicated above, however, the question of whether MSTV/Tucson has met this 30-day deadline is not easily resolved because there are two possible agency actions that could be considered the triggering event that starts the 30-day "clock" – the Bureau's waiver order, and the order granting Aloha's amended application associated with the waiver.

⁶ Aloha Request at 3.

⁷ The Association for Maximum Service Television, Inc. and Tucson Communications L.L.C., Response and Opposition to the Request for Expedited Ruling of Aloha Partners, L.P. (filed Apr. 11, 2005). Public notice of the grant of the application was established on February 28, 2005, via the Bureau's Universal Licensing System, File No. 0001777981.

⁸ *Id.* at 3, citing Request for Waiver by Woodburn School District, *Order*, 18 FCC Rcd 20089, 20090 (2003).

⁹ Aloha sought fifteen days from the date the Commission rules on Aloha's Request for Expedited Ruling in which to respond to MSTV/Tucson's Application for Review.

¹⁰ See 47 U.S.C. § 155(c).

¹¹ See 47 C.F.R. § 0.331(c). We note that while the rules specifically delegate to the Bureau limited authority to dismiss certain procedurally defective applications for review, they do not contain any delegation of authority to shorten or otherwise waive the filing deadlines set forth in the application for review provisions of Section 1.115. In light of our determination that the Commission should rule on the timeliness of MSTV/Tucson's Application for Review, however, we need not resolve the question of whether the Bureau has the delegated authority to issue a decision dismissing an Application for Review prior to the end of the pleading cycle prescribed in the rules.

¹² 47 C.F.R. § 1.115(d).

5. Under Aloha's approach, the relevant agency action is the Bureau's waiver order – the focus of MSTV/Tucson's substantive challenge – not the amended application associated with the waiver, which Aloha regards essentially as a ministerial act of implementation. Since MSTV/Tucson filed their Application for Review more than 30 days after the Bureau gave public notice of the waiver order, Aloha argues that the Application should be dismissed as procedurally defective. MSTV/Tucson, in contrast, defends the timeliness of their Application for Review by linking the filing deadline to the Bureau order granting Aloha's amended application associated with the waiver. Under MSTV/Tucson's approach, the waiver order is essentially functioning as an interlocutory ruling that has no immediate consequence until the amended application is granted, and only then is there an opportunity to seek Commission review. If, as MSTV/Tucson argues, public notice of the grant of the amended application triggers the beginning of the 30-day period for filing applications for review, then MSTV/Tucson's filing was timely.

6. The Bureau typically exercises its limited authority to dispose of an application for review when the procedural defects of the application are clear and straightforward. Here, we are presented with a novel question about the timeliness of the subject Application for Review, with reasonable arguments to support the opposing positions. Under these circumstances, we believe that Aloha's procedural objections to the Application for Review should be decided by the full Commission rather than by the Bureau on delegated authority. We therefore decline to reach a decision on the timeliness of the Application for Review.

7. Because Aloha's Request for Expedited Ruling was filed on the presumption that the Application for Review would be summarily dismissed, and in light of our decision to defer to the full Commission a final decision on the merits of Aloha's procedural argument, we hereby dismiss the Request for Expedited Ruling as moot. We also deny Aloha's Request for Extension of Time to File Response, as Aloha has failed to justify its request, and the Commission does not routinely grant such requests.¹³ Notwithstanding our decision to dismiss the Request for Expedited Ruling and deny Aloha's Request for Extension of Time to File Response, we note that Aloha's procedural objections to MSTV/Tucson's filing qualify as *ex parte* comments in the proceeding, which the Commission, in resolving the Application for Review, may consider fully.¹⁴

8. Accordingly, IT IS ORDERED that, pursuant to authority found in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131 and

¹³ See 47 C.F.R. § 1.46(a). We note that Aloha opted to rely on its assessment that the MSTV/Tucson Application Review was late-filed and therefore procedurally defective, rather than submit a timely opposition pursuant to rule section 1.115, 47 C.F.R. § 1.115(f), that included both procedural and substantive arguments with respect to MSTV/Tucson's Application for Review.

¹⁴ The Public Notice establishing the pleading cycle for comment on Aloha's waiver request states that this is a permit-but-disclose proceeding for "any *ex parte* presentations that are made with respect to the issues involved in the subject request, subsequent to the release of this Public Notice." *Wireless Telecommunications Bureau Seeks Comment on Aloha Partners, L.P.'s Request for Waiver of Section 27.60*, Public Notice, 19 FCC Rcd 12306 (2004).

0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, the Request for Expedited Ruling filed by Aloha Partners, L.P. on April 5, 2005 is DISMISSED as moot.

9. IT IS FURTHER ORDERED that, pursuant to authority found in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131, 0.331 and 1.46 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.46, the Request for Extension of Time to File Response filed by Aloha Partners, L.P. on April 14, 2005 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Lloyd W. Coward
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau